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OF WEST VIRGINIA

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Davis, C.J., concurring:

In this case, the majority reversed an order granting summary judgment to the appellee, Eastern Associated Coal Corp., and remanded the action to allow Mr. Skaggs to pursue his claim of discriminatory termination.¹ I agree with this disposition. However, I have chosen to write separately because I strongly disagree with the majority's partial reliance upon the decision in *State ex rel. McKenzie v. Smith*, ___ W. Va. ___, ___ S.E.2d ___ (No. 29645, June 28, 2002), in resolving this appeal.

McKenzie was wrongly decided and has no application to Mr. Skaggs' case.² The decision in *McKenzie* concerned the discretionary authority of the Commissioner to allow

¹Under W. Va. Code § 23-5A-1 (1978) (Repl. Vol. 1998) an employer may not terminate an employee as a result of the employee receiving workers' compensation benefits. The statute provides succinctly: "No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter."

²I dissented in *McKenzie* on the basis that the majority did not have authority to re-write workers' compensation statutes, under the guise of the rule of liberality, in order to undermine the discretionary authority of the Commissioner of the Workers' Compensation Division to allow employers to submit the names of preferred vocational rehabilitation providers. See *State ex rel. McKenzie v. Smith*, ___ W. Va. ___, ___ S.E.2d ___ (No. 29645 June 28, 2002) (Davis, C.J., dissenting, with Maynard, J., joining).

employers to submit a list of preferred vocational rehabilitation service providers. Thus, *McKenzie* has no relevance to the instant claims involving discriminatory termination. The issue posed by Mr. Skaggs was controlled exclusively by our prior decisions concerning discrimination under W. Va. Code § 23-5A-1 (1978) (Repl. Vol. 1998), and this case should have been resolved on that basis alone.

In view of the foregoing, I concur. I am authorized to state that Justice Maynard joins me in this concurring opinion.